Morse Operations, Inc., d/b/a Sawgrass Auto Mall and d/b/a Ed Morse Chevrolet *and* International Association of Machinists and Aerospace Workers, AFL–CIO. 12–CA–25466, 12–CA–25478, 12–CA–25493, and 12–CA–25674

October 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The issues before the Board in this case are whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Craig Robinson, and whether it violated Section 8(a)(1) by: interrogating its employees; creating the impression of unlawful surveillance; telling Robinson that he had been "blackballed" because of his union activity; and threatening employees with reprisals if they voted for union representation. The judge found that the Respondent committed all of these alleged unfair labor practices.[1]

The Board[2] has considered the decision and the record in light of the exceptions and briefs,[3] and has decided to affirm the judge's rulings, findings,[4] and conclusions, as discussed below, and to adopt the recommended Order as modified. [5]

Two of the Respondent's automobile dealerships in Florida are involved in this case: Ed Morse Chevrolet in North Palm Beach, and Sawgrass Auto Mall in Sunrise. All but one of the alleged violations occurred at the Sawgrass facility where Robinson, an automotive service technician, had initiated a union organizing drive in June 2007.[6] In the judge's view, the Respondent reacted to the Union's campaign by committing multiple unfair labor practices.

We agree with the judge that the Respondent violated the Act as alleged.[7] Two of the unfair labor practices, however, require further explanation: the Respondent's unlawful discharge of Robinson on June 27, and its threat of reprisal against employee Andrew Smith on July 18.[8]

1. Robinson's unlawful discharge

We agree with the judge that the evidence is sufficient to satisfy the General Counsel's initial burden under *Wright Line* of showing that Robinson's discharge was motivated by union animus.[9] With respect to the Respondent's *Wright Line* defense, the Respondent asserts

[1] On April 30, 2008, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed both a cross-exception and supporting brief, and a brief answering the Respondent's exceptions.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel's cross-exception requests that the Board's current practice of awarding only simple interest on backpay and other monetary awards be replaced with a practice of compounding interest on a quarterly basis. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See *Carpenters Local 687 (Convention & Show Services)*, 352 NLRB 1016 fn. 2 (2008).

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] The judge inadvertently failed to include the customary records-preservation provision in his recommended Order. We will modify it accordingly.

[6] All subsequent dates are in 2007.

[7] The judge found that on June 20, Harry Astor, the general manager of the Sawgrass facility, unlawfully created the impression of surveillance when he asked Robinson "how the leader of the rebel gang was doing today." In adopting the judge's finding, Chairman Schaumber observes that the Respondent does not argue that because Robinson had engaged in open Sec. 7 activity, he could not have reasonably inferred unlawful surveillance from Astor's remark.

[8] In light of our adoption of the judge's finding that the Respondent unlawfully threatened Smith with reprisal, we find it unnecessary to pass on the judge's finding that the Respondent also unlawfully threatened employees with reprisals in a speech on June 28. Such a finding would be cumulative and would not materially affect the remedy.

[9] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation under *Wright Line*, the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007); *Desert Springs Hospital Center*, 352 NLRB 112 (2008). Chairman Schaumber notes that the Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management. Co*., 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Chairman Schaumber agrees with this addition to the formulation, which the judge applied here.

that it would have discharged Robinson, even absent his protected union activity, for two reasons. First, it claims that Robinson had engaged in "warranty fraud" by billing the car manufacturer for more automatic-transmission fluid than he actually used when servicing the transmissions of cars under warranty. Second, the Respondent claims that Robinson had stolen 10 to 12 gallons of automatic-transmission fluid from the workplace. The judge rejected both rationales as pretextual.

In affirming the judge's pretext findings, we make the following observations. The Respondent did not cite theft as a reason when it terminated Robinson on June 27; it cited only his alleged warranty fraud. Moreover, at the unfair labor practice hearing, no witness testified that the Respondent relied on any alleged theft when it discharged Robinson. The Respondent raised theft as a motivating factor for the first time in its posthearing brief to the judge.[10] Under these circumstances, we find that the Respondent did not in fact rely upon an alleged theft of transmission fluid when discharging Robinson.

As for the warranty fraud claim, the General Counsel proved at the hearing that this purported reason for discharging Robinson was false or not in fact relied upon by the Respondent. Among other things, the Respondent asserted that Robinson "admitted" to warranty fraud at his June 27 discharge interview when he stated that he routinely billed for two quarts more transmission fluid than he needed for transmission overhauls. This practice, however, was consistent with the Respondent's standard operating procedure. The Respondent's technicians were required to order transmission fluid in one-gallon containers, and even if they used less than one gallon when servicing the customer's transmission, the entire gallon would be charged to the customer. Thus, Robinson's statement that he billed for more transmission fluid than he actually used is consistent with the Respondent's standard practice.

Accordingly, we agree with the judge that the Respondent's proffered explanations for the discharge were pretextual, and that Robinson's discharge violated Section 8(a)(3).

2. The unlawful threat of reprisal against Smith

On July 18, while the organizing campaign was in progress, Smith, another automotive service technician, was told to go to Manager Byrne's office. There he met with Byrne and David Quenzer, Smith's immediate supervisor. Smith was asked about "an immigration issue" that he and his wife were dealing with. In addition, Byrne brought up the Union, saying that based on his previous experience working in a union shop, the relationship between the Respondent and the service technicians would not be the same if they voted in the Union. Smith disagreed, referring to his own experience in a union shop in England. Byrne responded that voting for the Union would be perceived as "a personal attack" against him, and when Smith disagreed, Byrne said that the Company would not see it Smith's way.

The judge found that Byrne's description of voting for the Union as a "personal attack" improperly raised the issue of Smith's loyalty to the Respondent. In the judge's view, a threat of unspecified reprisals for choosing the Union was implicit in Byrne's comment, and therefore it violated Section 8(a)(1).

The Respondent contends in its exceptions that Byrne merely expressed management's opinion of union representation without any threat of reprisal, and that accordingly his statement was protected speech under Section 8(c).

The Board employs a "totality of circumstances" standard[11] to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activity,[12] and employer statements protected by Section 8(c).[13] An employer's suggestion that supporting a union is disloyal may violate Section 8(a)(1) if the circumstances are sufficiently coercive.[14] Here, Byrnes' statements were made

[10] Mike Byrne, the Respondent's service/parts manager who made the discharge decision, admitted that there was insufficient evidence to establish that Robinson had stolen the 10 to 12 missing gallons of transmission fluid. GC Exh. 11, p. 8.

[11] See, e.g., *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

[12] See, e.g., *Sprain Brook Manor Nursing Home,* 351 NLRB No. 75, slip op. at 15 (2007).

[13] See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Sec. 8(c) states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[14] See *Amptech, Inc.,* 342 NLRB 1131, 1135 (2004), enfd. 165 Fed.Appx. 435 (6th Cir. 2006) (supervisor's comment that organizing drive was a "personal attack" equated union support with disloyalty and, linked with an unlawful implicit threat of plant closure, violated Sec. 8(a)(1)); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 492–493 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996) (manager's statements that "union pushers" were "fighting him and his family," that it was a "war," and that they would not "kiss and make up" when it was over, held unlawful when uttered in a "context of extensive interference"). See also *Hialeah Hospital*, 343 NLRB 391, 391–392 (2004) (supervisor's statements to employees that he felt "betrayed" and "stabbed in the back" implied employee disloyalty in supporting the union, and constituted an implicit threat of unspecified reprisal in the circumstances). In *Hialeah Hospital,* then-Member Schaumber relied on other unlawful statements made during the same speech to find that the employer's "betrayed" and "stabbed in the back" comments violated Sec. 8(a)(1).

in the context of other unlawful actions by the Respondent. Specifically, they were made after the Respondent had unlawfully interrogated an employee, created the impression of surveillance, discharged an employee because of his union activities, and told the employee that he would not be rehired because of his union activities.

The coercive effect of these violations is confirmed by an interaction between Smith and Byrne prior to the July 18 meeting. Smith asked to speak with Byrne and Quenzer on June 30, based on Smith's concern that the Respondent perceived him as one of the union organizers. Smith explained his concern to them, and acknowledged that he had been to union meetings. He also told them that he understood that Robinson's discharge 3 days earlier was due to his organizing activity. He assured the two supervisors that the discharge had had the "desired effect" on him, and that he could not afford to lose his job. Neither Byrne nor Quenzer responded to what Smith said. The failure of the supervisors to respond to Smith is significant. It would be reasonable for Smith to interpret their silence as confirmation that the Respondent, in fact, had retaliated against Robinson because of his organizing activities.[15] In context, then, it would also have been reasonable for Smith to interpret Byrne's "personal attack" statement on July 18, as implying a reprisal against him.

Accordingly, we find that Byrne's statement to Smith on July 18, was not protected by Section 8(c), and we agree with the judge that it was a threat in violation of Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Morse Operations, Inc., d/b/a Sawgrass Auto Mall, Sunrise, Florida, and d/b/a Ed Morse Chevrolet, North Palm Beach, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly.

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. October 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nicholas Ohanesian, Esq. and *Marinelly Maldonado, Esq.,* for the General Counsel.[1]

Stuart A. Rosenfeldt, Esq. and *Todd I. Stone, Esq.,* for the Company.[2]

Jeffery M. Smith, Grand Lodge Representative, for the Union.[3]

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge and interference with employee rights case. I heard these cases in trial in Miami, Florida, on March 3 and 4, 2008. These cases originate from charges filed by International Association of Machinists and Aerospace Workers, USA–CIO (the Union) between June and December 2007. The prosecution of these cases was formalized on February 8, 2008, when the Regional Director for Region 12 of the National Labor Relations Board (the Board), acting in the name of the Board's General Counsel, issued an order further consolidating cases, consolidated complaint, and notice of hearing (the complaint) against the Company.

The complaint alleges the Company, at various times during the months of June and July 2007, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act as amended, (the Act) thus violating Section 8(a)(1) of the Act. Specifically during specified times it is alleged the Company violated Section 8(a)(1) of the Act by its supervisors and/or agents: interrogating employees about their union membership, activities, and sympathies; created an impression among its employees their union activities were under surveillance; threatened and impliedly threatened its employees with unspecified reprisals; threatened its employees with discharge; and, told an employee he could not be rehired because of his union activities. It is also specifically alleged the Company violated Section 8(a)(3) and (1) of the Act by on or about June 27, 2007, discharging and thereafter failing and refusing to reinstate its employee Craig Robinson (Robinson) because he joined and assisted the Union and engaged in concerted activities and to discourage employ-

[15] See *Maremont Corp.*, 294 NLRB 11, 40 (1989) (supervisor's failure to respond to employee's reply to supervisor's comment reinforced employee's interpretation of supervisor's comment).

[1] I shall refer to counsel for General Counsel as counsel for the Government or Government.

[2] I shall refer to counsel for the Company as counsel for the Company or Company.

[3] I shall refer to the Representative for the Charging Party as Union Representative or the Union.

ees from engaging in these activities.

The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record,[4] the post trial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION, LABOR ORGANIZATION STATUS, AND SUPERVISOR/AGENCY STATUS

The Company is a Florida corporation with offices and places of business located at 2677 Northlake Boulevard, North Palm Beach, Florida (Ed Morse Chevrolet) and at 14401 West Sunrise Boulevard, Sunrise, Florida, (Sawgrass Auto Mall) where it is, and has been, engaged in the business of the sale of new and used vehicles and the service and repair of vehicles. During the 12 months ending February 8, 2008, a representative period, the Company derived gross revenues in excess of $500,000. During the same time period the Company purchased and received at its above-described locations goods and materials valued in excess of $50,000 directly from points outside the State of Florida. The evidence establishes, the parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

It is admitted that Sawgrass Auto Mall General Manager Harry Astor (General Manager Astor), Sawgrass Auto Mall Director of Fixed Operations Mike Byrne (Operations Director Byrne), Sawgrass Auto Mall Service Director John Myers (Service Director Myers), Sawgrass Auto Mall Technical Service Manager David Quenzer (Technical Service Manager Quenzer), and Ed Morse Chevrolet Service Manager Daniel P. Leatherman (Chevrolet Service Manager Leatherman) are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Government's evidence

The events herein arise in the context of an organizing campaign by the Union at the Company during the summer of 2007. The Representation Petition filed by the Union (Case 12–RC–9262) was, for example, served on the Company via fax on June 19, 2007, and Operations Director Byrne gave a campaign speech to an assembled group of service technicians in the Company's lunch room on June 28, 2007. The divisions of the Company at focus in these proceedings are the Service and Parts Departments which are sometimes collectively referred to as the Fixed Operations division of the business. These departments are supervised by Operations Director Byrne. Parts Manager Joe Benitez, Service Director Myers and Technical Service Manager Quenzer all report to Operations Director Byrne. Service Director Myers supervises all employees coming in contact with customers of the Company related to services such as; service advisors, drivers, porters, and cashiers. Technical Service Manager Quenzer, on the other hand, supervises all employees that actually perform repairs on the vehicles. Operations Director Byrne has under his overall supervision approximately 60 employees 22 to 24 of which are service technicians in the service department.

Service Technician Robinson, who started with the Company in July 2005, was discharged on June 27, 2007. During his employment he was essentially the only service technician performing the heavy line work of repairing and overhauling transmissions. Robinson reported to Technical Service Manager Quenzer. Overall Robinson has 30 years of technician experience, is school trained, and has received various Mark of Excellence service awards from General Motors.

Robinson was the technician who contacted Union Organizer David Porter on June 11, 2007, to ascertain what a union could and could not do for the technicians at the Company. According to Robinson, Union Organizer Porter told him if he "was serious about starting a union . . . [he] should get a group of ten trust members together" and then he, Porter, would meet with them. Robinson explained "trust members" were employees he could trust not to leak information regarding their attempts at starting a union at the Company. Robinson prepared invitations to a party at his home for 6 p.m. on June 14, 2007. He distributed the invitations at work on June 14, by placing them on employee tool boxes and handing them out in the parking lot. The invitations made no mention of the Union. Ten technicians attended Robinson's home meeting where union organizer Porte explained what the Union could and could not do for the employees and what their rights were.

Robinson asked technicians the next day, June 15, 2007, in the parking lots, on breaks, and around their tool boxes to sign cards for the Union. As noted above, the Union thereafter on June 19, 2007, filed with the Board a representation petition for the employees.

On June 20, 2007, at around 2 or 3 p.m., Robinson and fellow technician Kevin Rose took a work break together in the employee parking lot where the two of them observed what they described as incoming stormy weather. According to both technicians, General Manager Astor and Operations Director Byrne approached and greetings were exchanged. Robinson and Rose testified General Manager Astor asked Robinson how the leader of the rebel gang was doing today. Robinson responded, fine. General Manager Astor then made some mention of safety glasses and he and Operations Director Byrne left the area. Robinson testified Rose told him "you just got licked." Robinson asked Rose what he meant and Rose told him, "you were just tagged the Union leader." Rose said the meeting lasted for approximately 3 to 5 minutes and although others may have passed by in the parking lot, the conversation

[4] The Government's unopposed motion to correct the transcript, as set forth in Judge's Exh. 1, is hereby granted.

only involved the four of them.

Robinson was called to Operations Director Byrne's office at around 8 a.m. on June 27, 2007, where he met with Byrne and Warranty Administrator Maryanne Rayot. According to Robinson, Operations Director Byrne showed him three invoices and talked, among other things, about work claimed and transmission fluid charged.

On the first invoice, Byrne asked Robinson why he always charged for 16 quarts of transmission fluid on every transmission overhaul. Robinson explained it took 10 to 12 quarts for the transmission refill after overhaul and five to eight quarts for the flush flow machine procedure.

Robinson said the automatic transmission flush flow machine worked to flush metal and debris from the system. The process involves attaching hoses to the flush flow machine and the repaired transmission to flush and back flush the system by expelling fluid into the cooler where it is cleaned of debris. It takes approximately 30 seconds to perform the flush and back flush procedure and then a flow test is run for 15 to 20 seconds to ascertain if the cooler is actually good or not. Robinson explained that in performing this flush flow machine procedure, five to eight quarts of transmission fluid are needed.

Former Company automotive technician for heavy engine repairs and back up transmission repairs James Norton testified he currently teaches automobile repair at Broward Community College. Norton worked with Robinson at the Company and after Robinson was discharged, he (Norton) became the transmission repair technician at the Company. Norton testified that the amount of transmission fluid needed for a transmission overhaul and a flush would depend on each individual application but on average most transmissions held between 9 and 12 quarts and in a transmission flush six to eight quarts were needed. Norton testified that four gallons of transmission fluid for a transmission overhaul and flush would not be excessive. Norton testified he kept transmission fluid in his work area and from time-to-time would have 10 to 12 gallons in his work area. Norton explained he kept it on top of his tool box, on the work bench, on the floor or anywhere else he could find space to store it. Norton stated that sometime in July, he was told he could no longer store transmission fluid in his work area but prior to that he had been so allowed. According to Norton, transmission fluid came in one gallon containers but after he became the transmission technician, the Company went to an overhead reel system for fluids.

Robinson testified the second invoice Operations Director Byrne discussed with him related to punch times which were not consistent with work performed or time charged for the work. Robinson believed the punch time on the invoice was for 7 hours and he thought he was paid for 10 hours on the invoice. Robinson could not understand exactly what Byrne was talking about; however; he believed Byrne did not think he had punched off and back on long enough after receiving a part or for starts and stops.

Robinson explained that when a technician starts work on a vehicle, the technician punches a ticket for that vehicle to prove he is working on the vehicle. If the technician stops working on the vehicle for lunch or to wait for parts, the technician punches out on the ticket for that vehicle. Robinson explained that in following the process over 30 years with General Motors "just because you clock it on for a set amount of time doesn't mean you have to be working on that vehicle for that whole time. If you're clocking on for 60 percent of the time, that's okay, and that's what I did."

The third invoice Operations Director Byrne discussed with Robinson involved two separate repair orders. The first repair order was for a transmission overhaul and an alignment. Byrne told Robinson it looked like the alignment sheet had been altered. Robinson agreed but said he had not done the alignment that it had been performed, he believed, by automotive technician David Ranier.

Robinson again explained that when more than one repair is listed for a vehicle, he would complete, for example, the transmission repairs and then take the keys to the vehicle and the repair order to, for example, the alignment technician. The alignment technician would perform the alignment and return the vehicle to the parking lot and return the paperwork to Robinson. Robinson would then take the paperwork along with the vehicle keys to the service or warranty writer explaining what had been performed on the vehicle and by whom. Robinson said he would not actually see the invoices or what the clerks entered into computers that generated invoices.

Robinson testified the second separate repair order on the third invoice he was shown was again for an alignment repair with a date 2 weeks before the time Robinson had repaired the transmission. Operations Director Byrne told Robinson he was paid for the alignment. Robinson protested telling Byrne he did not even know how to perform an alignment that he didn't have a "clue" even how to work the machine.

Robinson testified Operations Director Byrne told him that because he got paid for the alignment they were going to "separate" him. Robinson asked what he meant and then asked "did you just fire me?" Byrne said, yes. Robinson said he was shocked and looked over at Maryanne Rayot and "the look on her face was total shock."

Robinson left the meeting with Operations Director Byrne, "packed all my tools, rented a van, a moving van, and called a tow truck and they carted everything away." Robinson's immediate supervisor, Technical Service Manager Quenzer, stayed with Robinson until he got his equipment and left Company property.

Sometime after June 27, 2007, but before July 9, 2007, Robinson telephoned Chevrolet Service Manager Leatherman and asked if he needed any technicians. Robinson testified Leatherman told him, "yeah," and said, "I'd hire you in a second, you know, come on down." Robinson said he went to Ed Morse Chevrolet on July 9, 2007, and while looking for a parking place saw Chevrolet Service Manager Leatherman coming out of the shop and waved at him. Leatherman came over to Robinson's car where they talked as Leatherman leaned into the car window. Robinson asked about employment and testified Leatherman ". . . apologized to me, and he says, man, I'm sorry, I can't hire you. Ed Morse has blackballed you because of your union activity. And I said really? And he said yeah, I'm sorry. So that was about all that was said and, of course, I was mad, and I drove off in a huff." Robinson said he nevertheless left an employment resume with Leatherman before

driving away.

Five-year Company employee service technician Christopher Oland testified he had a conversation with Service Director Myers in the middle of the Sawgrass Auto Mall shop service area sometime in July 2007. Oland could not recall how the conversation got started but added, "somehow the Union popped up" and Myers asked, "if I went to one of the meetings." Oland told Myers he did not go to any of the meetings because no one told him about them. Oland recalled telling Myers he was not going to vote and he was against it. Oland said Myers encouraged him to vote but added he could not tell Oland how to vote. Oland told Myers he just wanted to be left alone he just wanted to do his job.

On June 28, 2007, Operations Director Byrne delivered a campaign speech in the lunchroom of the Company to an assembled group of automotive technicians. The speech follows:

> As David mentioned in the beginning of this meeting, we are now engaged in a campaign so that you can decide whether or not you will be represented by a Labor Union. I feel strongly that you would be making a big mistake by voting for a Union to represent you in your employment relationship with the Company. I have worked for many car dealerships during my career, and I have never experienced one more employee-friendly than Ed Morse Auto Mall. You are paid well, treated fairly and given every consideration to make your workplace comfortable and supportive. For instance, we are not required to spend over a $100,000.00 to install the giant fans in the service area. We did it because some of you came to us and complained about the heat. Additionally, when we installed the new carwash, we did not limit it to customer cars; we permitted you to have free use of the carwash for your personal vehicles.
>
> We have a family atmosphere at Ed Morse Auto Mall. As part of our family, you are treated with consideration and respect. This is the only dealership I have ever worked for that has a 401-K pension plan and matches your contributions. This is the only dealership that I have ever worked at where all employees share in the dealership rewards for having a good CSI score. Many of you received checks for as much as $1,800.00 when we got our last rating. In addition, we had a family barbeque and applauded ourselves, both management and employees, for a job well done, because the Company recognizes your good work and that you are a part of whatever the Company achieves. Other dealerships where I have worked did not even tell their employees that the dealership would receive CSI money, let alone share it with them or recognize their contributions.
>
> If you were represented by a Union, we would not be able to simply meet with you and discuss your concerns; we would have to meet with outsiders who are not part of our family. I received the petition filed by the Union, and I noticed that it was signed by someone from Texas and someone from Maryland. It is the International Union that is attempting to organize you; not a Local Union. Do you really think that, once they got your dues money, this Union is going to give a hoot about 26 guys located hundreds or even thousands of miles away?
>
> While ultimately, the law gives you the choice of whether or not you want to be represented by a Union, I truly believe that you would be making a serious mistake by agreeing to have them represent you. I am afraid that this interference by an outside stranger could change our family relationship forever, and we would lose the closeness that I know I have come to enjoy at Sawgrass Auto Mall. I hope that you have enjoyed it, too, and that you will vote to maintain that family closeness by VOTING NO to the Union.

Broward County, Florida, automotive teacher and former Company automotive technician Andrew Thomas Smith visited Robinson's home on a couple of occasions and attended a meeting for the Union at Robinson's home in mid-June 2007. Smith testified he thereafter sought, and obtained, a meeting with Operations Director Byrne in Byrne's office on June 30, 2007, because it had been brought to his attention that morning that he was being viewed as an organizer for the Union. Technical Service Manager Quenzer was also present for the meeting. Smith testified:

> Well, I mean basically, I confronted them about what I had heard that morning. I wanted a clarification on that. I said if that was the case, then I would—you know, if they were looking at me, then I would just start looking for another job, and I said to him [Byrne] now I had been to a couple of the meetings, but then when Craig [Robinson] got fired for organizing, it had the desired effect on me, and it basically scared me away. I couldn't afford to lose my job at that time.

Smith said Byrne made no response to his comments and Quenzer did not speak during the meeting.

Smith testified he was asked by either Operations Director Byrne or Technical Service Manager Quenzer to come to Byrne's office the afternoon of July 18, 2007. Smith said they exchanged pleasantries and Byrne asked how things were going with his wife and how they were dealing with "an immigration issue" on going at the time. According to Smith, Operations Director Byrne stated he had worked in a union shop and when a union was involved "we wouldn't have the same type relationship that we had . . . at that time." Smith explained he had worked in a union shop in England where he did his apprenticeship and that was not his experience that management worked with their unionized technicians and it did not affect their relationship at all. Smith testified Byrne:

> Stated that a vote for the Union would be a personal attack or you know, would be taken as a personal attack against him. And I said that that definitely wasn't the case and, you know, hoped that he wouldn't look at it that way. It was more a reflection on corporate policies as opposed to him personally.

Smith testified Byrne told him the corporation would not view it that way. The conversation ended and Smith left Byrne's office.

2. Company's evidence

Operations Director Byrne testified he learned from a General Motors factory representative on May 28, 2007, that an

auditor would be visiting all dealerships, not just the Company herein, to audit files on vehicles that had been repurchased or bought back by the manufacturer to identify if there were reasons the manufacturer could have avoided having to repurchase or buy back the vehicles. Byrne was told the audit would take place within 2 weeks. Byrne, who had never experienced a manufacturer audit before, decided, along with Technical Service Manager Quenzer, to do a walk through inspection of the service department that day.

During their walk through, Byrne discovered 10 to 12 unopened gallon containers of automatic transmission fluid in Automotive Technician Robinson's repair bay area. Operations Director Byrne said if a General Motors auditor had found the transmission fluid, the auditor would have gone through 2 years of previous transmission warranty claims and have made charge backs against the Company for all warranty repairs on transmissions where excess transmission fluid had been requested, billed for, but not used. Byrne estimated charge backs could have cost the Company tens of thousands of dollars.

Byrne did not immediately confront Robinson about the transmission fluid nor did he return the transmission fluid to the parts department, but, rather conducted an investigation of his discovery.

Operations Director Byrne noticed on or about June 4 or 5, 2007, the 10 to 12 gallons of transmission fluid was no longer in Robinson's repair bay area. Byrne checked and the transmission fluid had not been returned to inventory. Byrne still did not speak with Robinson regarding the whereabouts of the fluid but rather pulled all of Robinson's repair orders from the previous 30 days. Byrne also asked Warranty Administrator Maryanne Rayot to start personally giving him all transmission repair orders that came across her desk. Byrne said he discovered Robinson consistently billed for four gallons of transmission fluid for each repair job which, according to Byrne, was one to one and a half gallons too much.

Operations Director Byrne did not tell the auditor what he uncovered about Robinson and the transmission fluid when the auditor commenced his investigation at the Company on June 13, 2007. The auditor's concern related to whether everything was being done before repurchases or buy backs of automobiles under warranty was accomplished. The auditor found no fault with Robinson's work as it related to the purpose of the auditor's investigation.

Byrne continued his personal investigation of Robinson over a 2-week period and randomly selected three repair orders that raised concerns. Operations Director Byrne discussed his concerns related to the three repair orders with General Manager Astor on June 18, 2007. Byrne testified, "I explained to [General Manager Astor] the investigation that I had performed and the findings that I had, and I recommended termination [of Robinson]." General Manager Astor told Operations Director Byrne to terminate Robinson if he was comfortable with the supporting documentation. Byrne said his recommendation to terminate Robinson was specifically based on warranty fraud, namely charging and being paid for work not performed and for products ordered but not used. More specifically, Byrne said Robinson was terminated for "transmission fluid billed out and not used."

Byrne indicated, in his pretrial Board affidavit, that he and General Manager Astor decided on June 18, that Robinson would be terminated on June 22, 2007. Byrne indicated in his pretrial affidavit that he was faxed a copy of the Union petition on June 20, 2007. Operations Director Byrne indicated that after a discussion with General Manager Astor reference the petition, they decided to put Robinson's termination on hold and sought legal advice. It was thereafter decided Robinson would be terminated on June 27, 2007. In his pretrial Board affidavit, Byrne indicated he notified Robinson's immediate Supervisor, Technical Service Manager Quenzer, on the evening of June 26, 2007, that Robinson would be terminated the next day. Byrne, in his pretrial affidavit, indicated he asked Warranty Administrator Rayot the night of June 26, 2007, to be a witness at the termination of Robinson the next morning. According to Byrne, Rayot never spoke during the meeting that she was there to observe only.

Operations Director Byrne along with Warranty Administrator Rayot met with Robinson on June 27, 2007, to discuss the three invoices and the surplus of transmission fluid. Byrne testified he explained to Robinson his investigation revealed Robinson was billing a gallon and a half too much transmission fluid on each of his repair orders. Byrne said Robinson explained he flushed the transmission coolers which accounted for the fluid to which Byrne stated "you use a gallon and a half to flush the transmission cooler, and his response was, no, you're right, I probably bill out two quarts more than I use. So that's when I said there was no further investigation." According to Byrne, Robinson was immediately terminated.

Warranty Administrator Maryanne Rayot testified she attended, as a witness, the June 27, 2007 termination meeting with Operations Director Byrne and Robinson. Rayot's brief testimony in pertinent part follows:

> We went over some warranty issues, transmission repairs, specifically fluid, overcharges on repair orders. Mike [Byrne] questioned Craig [Robinson]. I was there as a witness. We thought we were about six quarts over on every job. Craig explained that with flushes he used about four quarts and that we were over two quarts on every job, at which point Mike terminated him [Robinson].

Operations Director Byrne stated, in his pretrial affidavit, he personally terminated two other employees for theft. According to Byrne, the first was automotive technician James Petersen who worked on someone else's vehicle during working hours and was being paid by outside sources without the Company being paid for the work. Byrne said that Petersen ever bought parts with the employee discount for the outside repair. Further, in his pretrial affidavit, Byrne indicated a second employee engaged in fraud and was terminated, namely Mike Broch.

General Manager Astor testified he never spoke to Robinson in the employee parking area on June 20, 2007, nor did he call Robinson a rebel leader. According to Astor, June 20, 2007, was a clear day.

Chevrolet Service Manager Leatherman testified that sometime in July 2007, Robinson contacted him by telephone and asked if he was looking for any technicians. Leatherman asked

Robinson if he was still doing transmission type work. Robinson said he was, and Leatherman told Robinson he was not hiring a transmission technician but he would keep Robinson in mind if in the future he needed someone. Leatherman said their telephone conversation lasted maybe 40 seconds. Leatherman testified Robinson did not thereafter come to the dealership or meet with him about reemployment. Leatherman specifically denied speaking with Robinson in the parking lot at the dealership or at anytime thereafter about employment, and said Robinson never provided the Company a resume.

B. Discussion Credibility Determinations and Conclusions

1. Interference allegations

It is alleged at paragraph 5 of the complaint that on or about June 20, the Company by General Manager Astor, at the Company's Sawgrass Auto Mall employee parking lot interrogated its employees about their union membership activities and desires and created an impression among its employees their union activities were under surveillance by the Company.

The question of whether a meeting between General Manager Astor, Operations Director Byrne, automotive technicians Robinson and Rose took place on June 20, 2007, is contested. Robinson and Rose testified in detail about such a meeting while Astor denied any meeting occurred and further specifically denied ever making the comments attributed to him. Operations Director Byrne did not address this issue in his trial testimony. Byrne did deny, in a pretrial Board taken affidavit, hearing such comments.

Resolution of credibility conflicts are often difficult, requiring the weighing of plausible narrations of testimony by witnesses who appear truthful and no more biased or prejudiced than others testifying totally differently. Indeed resolution by the judge, or a jury in a jury trial, is simply a practical solution not a mark of truth absolute. Mindful of the above, I am nonetheless persuaded Robinson attempted to honestly recall pertinent facts and events to the best of his ability. He, for the most part, was calm and confident as he testified with only an occasional emotional response. I am persuaded he felt strongly about his case but I am also convinced his feelings did not impact his ability and willingness to recall events and conversations accurately. Rose corroborated Robinson's testimony. I note that while Operations Director Byrne testified, he was not asked whether such a meeting took place and if so what was said. I am not unmindful that Robinson and Rose perceived the weather was looking like a storm was incoming while General Manager Astor viewed the weather as clear on the day in question. I am persuaded both could be correct in their perceptions in that it might appear, by wind direction or otherwise, that a storm could be coming in while the sky is clear. Accordingly, I place no weight on the conditions of the weather in making my credibility determinations.

Does General Manager Astor's comments, which I find were made to Robinson, namely, how the leader of the rebel gang was doing that day constitute unlawful interrogation and/or create an impression among the employees their union activities were under surveillance by the Company?

I note certain guiding principles before I address this allegation of interrogation and of an impression of surveillance.

Interrogation is not, by itself, a per se violation of Section 8(a)(1) of the Act. The test for determining the legality of employee interrogation regarding union sympathies is whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed employees by the Act. Under this totality of circumstances approach consideration is given to; whether the interrogated employee is an open or active supporter of the union, the background surrounding the interrogation, the nature and purpose of the information sought, the identity of the questioner, the place and/or method of the interrogation, and the truthfulness of any reply by the questioned employee. *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub. nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). These factors are not to be mechanically applied but rather are to be useful indicia that serve as a starting point for assessing the totality of the circumstances. That the interrogation might be courteous, funny, and/or low keyed instead of boisterous, rude, and/or profane does not alter the case.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his or her union activities have been placed under surveillance. When an employer creates the impression among its employees that it is watching or spying on their union activities, or employees' future union activities, their future exercise of their Section 7 rights tend to be inhibited. *Link Mfg.*, 281 NLRB 294 (1986), enfd. mem., 840 F.2d 17 (6th Cir. 1988), cert. denied 488 U.S. 854 (1988). The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is employees should be free to participate in union organizing campaigns without fearing members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.

I am persuaded General Manager Astor's question directed to Robinson about how the leader of the rebel gang was doing constituted interrogation and created an impression the employees' union activities were under surveillance. Robinson had only days earlier contacted the Union about representation. It appears Robinson attempted to keep his activities for the Union secret. He invited employees to his home for a party on June 14, 2007, but did not mention the Union in the invitation. He was told by the Union to select employees that would not leak information about the Union to the Company. When collecting signatures for the Union on June 15, 2007, he attempted to do so without the Company knowing about it. The Company, however, knew generally there was union activity. The parties stipulated the Company received by fax, at approximately 4 p.m. June 19, 2007, the petition for an election in Case 12–RC–9262. General Manager Astor clearly is a high ranking company official. General Manager Astor was conveying to Robinson and Rose the Company knew about their union activities including the meeting at Robinson's home and Robinson's support for the Union. No valid purpose was, or for that matter could have been, advanced for the inquiry. Automotive Technician Rose confirmed the Company was pointing out Robinson as the leader when Rose told Robinson he had just been tagged by Astor as the leader for the Union. To ask how the

rebel leader was doing in these circumstances constitutes unlawful interrogation and I so find. It also leaves employees with the impression their activities on behalf of the Union are under surveillance by the Company and I so find.

It is alleged at paragraph 6 of the complaint that on or about late June or early July 2007, Service Director Myers at the Company's Sawgrass Auto Mall service shop interrogated employees about their union membership, activities, and sympathies.

It is undisputed that Service Director Myers engaged service technician Oland in a conversation about the Union on the shop floor in the service area in July 2007. Although Oland could not recall how the conversation originated the subject of the Union "popped up." There is no showing Oland had made his union sentiments known to management. Myers wanted to know if Oland had attended one of the union meetings. It is clear from Myers' question management knew of employee meetings about the Union. It is also clear the purpose of Service Director Myers' inquiry was to ascertain where Oland stood with respect to the Union. Once Oland told Myers he had not attended any of the meetings and was against it Myers encouraged Oland to vote but added he could not tell Oland how to vote. It was not necessary at that point to tell Oland how to vote because Myers had already established by his questioning that Oland was against the Union. Considering all the circumstances, I find, that Service Director Myers questioning of Oland reasonably tended to restrain, coerce, and interfere with Oland's rights guaranteed by the Act and violates Section 8(a)(1) of the Act.

It is alleged at paragraph 7 of the complaint that Operations Director Byrne on about June 28, 2007, in a speech to employees in the technician's lunchroom at the Company's Sawgrass Auto Mall impliedly threatened its employees with unspecified reprisals if they selected the Union as their bargaining representative.

The parties stipulated to the content of Operations Director Byrne's speech

Does Operations Director Byrnes' comments in his June 28 speech to employees that "I feel strongly that you would be making a big mistake by voting for a Union to represent you in your employment relationship with the Company" impliedly threaten its employees with unspecified reprisals? Standing alone, I am persuaded it would not, but considering the overall content of the speech, I am persuaded it does. Byrne outlined numerous benefits the Company provided: the employees were well paid, they were made comfortable with expensive giant fans in the service area, free car washes, a 401-K pension plan with matching contributions, dealership awards, family barbeques, and recognition for a job well done. Byrne advised, however, if the employees were represented by a union the Company could no longer meet with the employees but with outsiders who were not part of their family, and added the employees would be making a serious mistake by agreeing to have a union represent them; that this interference by an outside stranger could change the family relationship forever. Implied in the totality of the speech is the clear message that employees are no longer going to enjoy the good times and benefits they currently enjoyed if they selected the Union to represent them but would rather face reprisals. Such is coercive and violates Section 8(a)(1) of the Act and I so find.

It is alleged at paragraph 8 of the complaint that on or about July 18, 2007, at the Company's Sawgrass Auto Mall in Operations Director Byrne's office, Byrne threatened employees with discharge and unspecified reprisals if they selected the union as their bargaining representative.

I note the test in determining whether an employer's conduct constitutes an unlawful threat or implied threat of reprisals or retaliation for employees' engaging in protected activity is whether the remark(s) may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act, and does not turn on the motivation for the remark(s) or rely on the failure or success of the coercion. *Joy Recovery Technology Corp.,* 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). When applying this standard, the Board considers the totality of the relevant circumstances.

It is undisputed employee Smith was asked to meet with Operations Director Byrne in Byrne's office on July 18, 2007. It is likewise undisputed Byrne inquired about "an immigration issue" Smith and his wife had ongoing at the time. Operations Director Byrne then told Smith that he (Byrne) had worked in a union shop and when a union was involved, management and the employees would not have the relationship they had without union involvement. Smith explained he had worked in a union shop in England and his experience was that management worked with their unionized technicians without affecting their relationship. Operations Director Byrne also told Smith a vote for the Union would be taken as a personal attack against him. Smith told Byrne that was not the case and hoped Byrne would not look at it that way that it was more a reflection on corporate policies as opposed to Byrne personally. Byrne told Smith the Company would not view it that way.

For a manager, as Byrne did, to tell an employee the manager would consider a vote for the Union as a personal attack against him calls in question the employee's loyalty to the Company. This is especially so here in light of the fact Smith told Byrne such was not the case and he hoped Operations Director Byrne would not look at it that way. Byrne responded by telling Smith the Company would not view it that way. Thus, I find such to be coercive and a violation of Section 8(a)(1) of the Act. Such leaves the employee with the clear impression of future unspecified reprisals for voting for union representation.

It is alleged at paragraph 9 of the complaint that on or about July 9, 2007, the Company, by Chevrolet Service Manager Leatherman at the Company's Ed Morse Chevrolet facility told an employee he could not be rehired by the Company because of his union activities.

Robinson, as earlier noted, was terminated by the Company on June 27, 2007. It is undisputed Robinson and Leatherman knew each other and had worked together some years earlier at an unrelated Chevrolet dealership in the greater Miami, Florida area. It is likewise undisputed that Robinson telephoned Leatherman, sometime in July 2007, after he had been terminated at the Sawgrass Auto Mall facility of the Company, about work at the Ed Morse Chevrolet dealership of the Company. It is however very much in dispute regarding what was said in the

telephone call and whether the two thereafter personally met regarding Robinson's reemployment and whether Robinson provided Leatherman with a job resume.

I find Chevrolet Service Manager Leatherman told Robinson in their July 2007, telephone conversation he needed technicians and would hire Robinson in a minute, as testified to by Robinson, and for Robinson to come to the dealership. I am persuaded Robinson went, as he testified, to the dealership with a resume, but was told by Leatherman he could not be hired he was "blackballed' by Ed Morse because of his union activities. Robinson's expectation of being hired is supported by his taking a resume to Ed Morse Chevrolet. Robinson left the resume with Leatherman even thought he was not hired and told he could not be hired because of his union activities. To tell an employee he can not be hired or rehired because of his union activities clearly violates the Act and I so find.

It is alleged at paragraph 10 of the complaint the Company on or about June 27, 2007, discharged its employee Robinson and thereafter failed and refused to reinstate or reemploy Robinson because he joined and assisted the union and engaged in concerted activities, and to discourage employees from engaging in these activities.

To establish a violation of Section 8(a)(3) of the Act, the government must prove, by a preponderance of the evidence, that an individual's protected activity was a motivating factor in the employer's action. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Once the government makes this showing, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even in the absence of the protected conduct. To sustain its burden the government must show the employee was engaged in protected activity, the employer was aware of that activity, the activity or the employee's union affiliation was a substantial or motivating reason for the employer's action, and, there was a causal connection between the employer's animus and its challenged conduct or decision. The government may meet its *Wright Line*, supra, burden with evidence short of direct evidence of motivation, i.e. inferential evidence arising from a variety of circumstances such as union animus, timing, or pretext may sustain the government's burden. Furthermore, it may be found that where an employer's proffered nondiscriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Flour Daniel, Inc.,* 304 NLRB 970 (1991). Motivation of union animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union Tribune Co. v. NLRB,* 1 F.3d 486, 490–492 (7th Cir. 1993). Direct evidence of union animus is not required to support such inference. *NLRB v. 50-White Freight Lines, Inc.,* 969 F.2d 401 (7th Cir. 1992). If it is found an employer's actions are pretextual, that is, either false or not relied upon, the employer fails by definition to show it would have taken the same action for those reasons and it is unnecessary to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Robinson engaged in union activities. He contacted the Union, held meetings for the Union at his home, solicited union authorization cards, and spoke to employees at the facility about the Union. The credited evidence establishes management at the highest levels knew Robinson not only supported the Union but was its employee leader. General Manager Astor considered Robinson the employee union leader when, on June 20, 2007, he asked Robinson how the leader of the rebel gang was doing that day. General Manager Astor's comments indicate, or at least imply, the Company knew of its employees' union activities that it had their activities under surveillance and could thus identify who (namely Robinson) was the employee leader.

Furthermore, it is clearly established the Company harbored animus against its employees' union activities and against Robinson's union activities in particular. The Company's animus is demonstrated, in part, by the fact it not only interrogated Robinson and left the impression his and other employees' activities were under surveillance; but, management representatives interrogated other employees, threatened employees with unspecified reprisals because of their union activities and specifically told Robinson he could not be rehired because of his involvement with the Union.

Timing also strengthens a showing of antiunion animus by the Company. Robinson contacted the Union on June 11, conducted one of at least two meetings at his home for the Union on June 14, solicited cards for the Union on June 15, is identified by the Company as the leader of the rebel (union) gang on June 20, and is discharged on June 27, 2007. In the middle of the activity related to Robinson, the Union files a representation petition on June 19, 2007. The causal connection between Robinson's union activities and his discharge is highlighted by Chevrolet Service Manager Leatherman's telling Robinson he could not be hired at Ed Morse Chevrolet because Ed Morse had blackballed Robinson as a result of Robinson's union activities.

I am persuaded the Government clearly established a strong prima facie showing the Company discharged Robinson because of his union activities.

The Company' s contention, in its posttrial brief, that the decision to discharge Robinson was made on June 18, 2007, based on theft of unused transmission fluid does not withstand close scrutiny. Likewise, Operations Director Byrne's testimony at trial that he recommended to General Manager Astor on June 18, 2007, that Robinson be terminated based on warranty fraud namely Robinson's charging and being paid for work not performed and for products not used does not withstand scrutiny.

I am fully persuaded the Company seized upon the transmission fluid and/or warranty fraud concerns as a pretext to discharge Robinson. While Operations Director Byrne contends he observed 10 to 12 unopened gallon containers of automatic transmission fluid in Robinson's repair bay area on May 28, 2007, he did not confront Robinson with his discovery. Byrne did not return the unused fluid to the parts department. Although Operations Director Byrne contends he reviewed numerous repair orders after he discovered the excess fluid in

Robinson's work bay and further discovered Robinson had consistently requested too much transmission fluid he only confronted Robinson with three invoices when he terminated him on June 27, 2007, and two of the three invoices primarily addressed Robinson not clocking in and out on work repairs and being paid for an alignment he did not perform rather than stressing or dwelling on the excess fluid situation. In fact, Byrne told Robinson in the exit interview he was going to separate him because he was paid for an alignment he did not perform.

I note Robinson advised Byrne, when he was terminated, that the four gallons of transmission fluid he requested for an overhaul and flush of an automatic transmission was the appropriately required amount. Former Company automotive technician and current instructor at Broward Community College, James Norton, corroborated Robinson's assessment of the amount of fluid needed when he testified most transmissions required 9 to 12 quarts of transmission fluid and that a transmission flush took between 6 and 8 quarts and to request four gallons of transmission fluid for an overhaul and flush of a transmission was not excessive. Norton and others noted transmission fluid only came in gallon containers and if a smaller amount than a gallon was needed, it was necessary to request the full gallon.

The evidence does not support the Company's basic contention Robinson stole the 10 to 12 gallons of transmission fluid Byrne claims to have seen at Robinson's work station. First, there is absolutely no direct evidence of any such theft. Second, after Operations Director Byrne made his initial preaudit walk through and in preparation for the manufacturers' audit, he instructed all automotive technicians to clean used parts and everything else out of their work bay areas before the manufacturer's representative made his inspection or audit. This is just as logical an explanation for the "removal" of any fluid or other parts from the work bay areas as is the conclusion that products were stolen. The Company tolerated excess transmission fluid stored in the work area where automatic transmission repairs and flushes took place. Former automotive technician Norton testified he replaced Robinson as transmission repair technician and at times kept, depending on how many jobs he had ongoing, 10 to 12 gallons of transmission fluid in his work area stored on his work bench, the floor, his tool box, or wherever else he could find space to put it. Norton continued to keep transmission fluid in the work area until a month or two after Robinson was discharged and continued to do so until one Friday morning in July 2007 when Operations Director Byrne, Service Director Myers, and Technical Service Manager Quenzer met with the technicians and told them they could no longer keep unused items in their bay areas. Norton testified that prior to that time nothing had ever been said about keeping transmission fluid in the work bay area before.

Finally, I note the Company's investigation of Robinson's asserted misconduct differs from its prior practice. A former employee, James Petersen, was discharged in December 2005 for performing repairs on a friend's vehicle without approval from the Company and without the Company being paid for the repairs. In Petersen's situation, his immediate supervisor, Technical Service Manager Quenzer, conducted the investigation and with Operations Director Byrne discussed the situation with Petersen. Petersen was thereafter suspended and ultimately discharged. In Robinson's situation, his immediate supervisor, Quenzer, was not involved in the investigation and Robinson was only confronted after a decision had already been made to terminate him. Technical Service Manager Quenzer was, it appears, only utilized to escort Robinson from the Company's facility when Robinson was terminated.

In a second incident in December 2005, Technical Service Manager Quenzer discovered a situation where employee Mike Broch was working a side job not authorized or approved by the Company. Again, Quenzer, along with Operations Director Byrne, confronted Broch regarding the unauthorized side work and suspended him pending further investigation. Ultimately, Broch was discharged. Here again the Company followed the practice of investigating, confronting, further investigating, and then taking final action. Such procedure was not followed with Robinson.

In light of all the above, I find the Company utilized the transmission fluid situation with Robinson as a pretext to discharge him.

I find the Company violated Section 8(a)(3) of the Act when it discharged Robinson on June 27, 2007.

CONCLUSION OF LAW

By, since on or about June 2007, interrogating its employees about their union membership, activities, and sympathies; creating an impression among its employees that their union activities were under surveillance; threatening and impliedly threatening its employees with unspecified reprisals if they selected the Union as their bargaining representative; and, telling an employee he could not be rehired by the Company because of his union activities the Company violated Section 8(a)(1) of the Act. By on, or about, June 27, 2007, discharging and thereafter failing and refusing to reinstate its employee Craig Robinson because he joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities the Company violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company having discriminatorily discharged and thereafter having failed and refused to reinstate its employee Craig Robinson, I recommend that it, within 14 days from the date of the Board's Order, offer him full reinstatement to his former job, or if his former job no longer exists to a substantially equivalent position without prejudice to his seniority, or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him with interest. Back pay shall be computed in accordance with *F. W. Woolworth,* 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987). I also recommend the Company be ordered, within 14 days of the Board's Order, to remove from its

files any reference to the unlawful discharge of Craig Robinson and, within 3 days thereafter, notify him in writing it has done so. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Company, Morse Operations, Inc. d/b/a Sawgrass Auto Mall and d/b/a Ed Morse Chevrolet, it officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their membership, activities, and sympathies for the Union; creating among its employees an impression that their union activities were under surveillance, threatening and impliedly threatening its employees with unspecified reprisals if they select the Union as their bargaining representative, and telling its employees they could not be rehired because of their activities on behalf of the Union.

(b) Discharging and thereafter refusing to reinstate its employees because they joined and assisted the Union and engaged in other protected activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, offer Craig Robinson full reinstatement to his former job, or, if his former job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed.

(b) Within 14 days of the Board's Order, make Craig Robinson whole for any loss of earnings and other benefits resulting from his discharge and failure to reinstate him, less any net interim earnings, plus interest.

(c) Within 14 days of the Board's Order, remove from its files any reference to Craig Robinson's unlawful discharge and failure to reinstate him and, within 3 days thereafter, notify him in writing that this has been done and his discharge and unlawful failure to reinstate him will not be used against him in any manner.

(d) Within 14 days after service by the Regional Director of Region 12 of the National Labor Relations Board, post at its North Palm Beach and Sunrise, Florida facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 12 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facilities involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees, to all employees employed by the Company on or at any time since June 20, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps the Company has taken to comply.

Dated, Washington, D.C. April 30, 2008.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate our employees about their union membership activities and sympathies for International Association of Machinists and Aerospace Workers, AFL–CIO, or any other labor organization.

WE WILL NOT create an impression among our employees that their union activities are under surveillance.

WE WILL NOT threaten or impliedly threaten our employees with unspecified reprisals if they select the Union as their bargaining representative.

WE WILL NOT tell our employees they can not be rehired because of their union activities.

WE WILL NOT discharge and thereafter fail and refuse to reinstate our employees because they join or assist the Union and engage in other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days of the Board's Order, offer Craig Robinson reinstatement to his former job, or if his former job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Craig Robinson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the discharge and failure to reinstate Craig Robinson, and WE WILL, within 3 days thereafter, notify him, in writing that this has been done and that his discharge and our failure to reinstate him will not be used against him in any manner.

MORSE OPERATIONS, INC. D/B/A SAWGRASS AUTO MALL AND D/B/A ED MORSE CHEVROLET